United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7472

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,

Plaintiffs-Appellees,

against

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10 OF I.L.G.W.U. and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Defendants-Appellants.

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

Table of Cases (Continued)

TABLE OF STATUTES

TABLE OF OTHER AUTHORITIES

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STATEMENT OF THE CASE

Nature of the Case

Appellees brought suit below, pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC 412, alleging that they had been disciplined by Appellant local labor organization ("Local 10") and its parent international ("ILGWU") without having been afforded a full and fair hearing, as required by Section 101(a)(5)(C) of that Act, in that, inter alia, Local 10's Trial Committee had excluded them, and their "lay counsel", from their own trial. The Appellees demanded compensatory and punitive damages, costs (including reasonable attorneys' fees) and permanent injunctive and declaratory relief. See: Complaint, J.A. Exh.

4; pages: J.A. 8, 13.*

The disciplinary punishment "suspended" the three Appellees, members of Local 10, from attending any and all membership meetings of Local 10 for periods of 12 and 18 months. It had gone into effect in January 1976, and remained in effect while Appellees exhausted their internal union remedies. Together with their Complaint, therefore, plaintiffs served on the two unions a motion for preliminary injunction enjoining the unions from enforcing the disciplinary "suspension."

Upon lengthy and voluminous papers (most of them submitted by the two labor organizations, Appellants here**), and after three hearings in the Court below, at which material facts not in dispute were stipulated to, the Court below found that the three members had established their probable success on the merits and possible irreparable injury in exclusion from

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* The undersigned was not served with the Joint Appendix until October 26, 1976, three days before Appellees' brief was due to be filed. Prior thereto (and at the time when this brief was being written), the undersigned had before him, by way of appendix, only a large scrapbook, without pagination, and with various parts of the record stapled to the pages as "exhibits." Each "exhibit" had a number. Hence, reference was originally made, in this brief, to the J.A. "exhibit" number and the page thereof (or the actual exhibit to such "exhibit"): e.g.: "Exhibit Y to J.A.Exh.15(a)."

With the Joint Appendix at last before him, the undersigned has attempted to replace those references with correct references to the pages of the Joint Appendix -- either by retyping or by whiting out the old references and superimposing the new. Since Appellees' Brief must be filed no later than October 29, however, this has been done in some haste, with resulting ugliness, for which the undersigned apologizes.

** For example, the affidavits filling pages J.A. 186 to 360, and J.A. 385 to 537 (some 326 pages of affidavits) were all submitted by Appellants. By contrast, Appellees submitted only 31 pages, those comprising pages J.A. 180 to 185, and J.A. 361 to 384.

their right to attend membership meetings, and that they had likewise met the alternative test of showing sufficiently serious questions going to the merits to make them a fair ground for ligitation, plus showing that the balance of hardship tipped decidedly in their favor (see: Transcript, Sept. 17, 1976, J.A. 170; and Memorandum Opinion, J.A. 5-6). Accordingly, an Order enjoining defendants from giving force or effect to the "suspension," pending trial and ultimate disposition of the action, was entered (J.A. 2). It is from that Order that the two unions appeal.

The Disciplinary "Suspension"

In February 1975, the Manager of Local 10, Abe Dolgen, filed disciplinary charges against the three members accusing them of "interfering" with "the functions and powers" of Local 10 and its officers, "disobeying" the officers, etc., by refusing to leave his office some two weeks earlier (see: Affid. of Brodsky, Exhibit thereto, J.A. 276-277).
The three members have been tried three times by trial committees of Local 10 on those charges, and disciplinarily "suspended" three times. Though all three "suspensions" went into effect and remained in effect for some time*, the first two have been set aside by ILGWU's higher bodies and are thus admit-admittedly invalid. And for good reason: at the first

* ILGWU's Constitution, Article 23, Section 1 (Attached as Exh. "A" to the first Affid. of Lipsig, J.A. 489) provides that all decisions of trial and appeal bodies shall be binding as soon as rendered. Thus, while a member is required to exhaust internal remedies before bringing suit to set disciplinary punishment aside, he suffers the punishment while he is doing so. As a result, each of the three members has suffered disciplinary "suspensions" aggregating more than a year on Dolgen's charges.

of the three union trials, Dolgen himself (the charging party) sat as a trial committee member; at the second , the trial committee was composed of persons who, as members of the first trial committee, had unanimously judged the three members guilty (see: Rosario Affid., J.A. 181, para. 5).

The ILGWU was evidently loath to set either of the first two suspensions aside: its Appeal Committee gave spurious reasons for setting the first aside while rhetorically condemning the three members (J.A. 173-174) and upheld the second suspension (J.A. 175-177). It was only after the three members had brought suit to have the second suspension declared unlawful* (having first exhausted all union remedies that could be exercised within four months), that the ILGWU's General Executive Board set it aside and directed a third trial** (Rosario Affid., J.A. 181, para. 6). It would appear that both reversals were responses to actions in court, real or anticipated.

In its direction for a third trial, ILGWU's General Executive Board (after berating the three members for non-exercise of a non-existent appeal right to it) directed that a new

* Rosario v. Dolgen, 75 Civ. 4632 (CBM), still pending in the Court below.

** Members disciplined by a local union's trial committee are not allowed to appeal to the General Executive Board. Instead, their appeals lie to an Appeal Committee, and from there to the ILGWU's International Convention (which will next meet in May 1977). But the General Executive Board has power on its own motion to review, affirm, modify or reverse Appeal Committee decisions. ILGWU Constitution, Article 23, Section 5(b) and (e), p. 56 (Exh."A" to the first Lipsig Affid., J.A. 489).

trial committee be elected and that it, in turn, elect its Chairman and Secretary (Exh. D to Brodsky Affid., J.A. 295). The committee was elected, though in a manner calculated to result in a handpicked one: notice of the meeting date, normally posted months in advance, was not posted on Local 10's bulletin board until a week before the meeting (Cabel Affid., J.A. 362-323, para. 6; Spitzer Affid, J.A. 371, para. 9; Rosario Affid., J.A. 377-78, paras 5 to 7). As a result, turnout for the meeting was extremely small. Then, while Local 10's officers and business agents watched, vote was taken by hand. Cabel attempted to demand a secret ballot, but as he did so the microphone he was speaking into was turned off (Cabel Affid., J.A. 362, para. 5).

In advance of the third union trial, the three members demanded copies of the official "minutes" of the preceding trial (exhibits to Klein Affidavit, J.A. 223, 226-227, 230-231, 235) but their demands were rejected (J.A. 224-225, 228-229, 232-234, 236-237). They had, previously, at prior trials, demanded copies of the official minutes and had been promised them, but the minutes were never given them (Spitzer Affid., J.A. 369, 370, para. 6, 8).

The three members also demanded, as they had at previous trials (Exhibits to Klein Affid., J.A. 238, 239), the right to make a tape record of the trial proceeding. As they informed the second trial committee (J.A. 239), they had discovered that the official minutes of the first trial, taken by Klein, the first committee's Secretary, had been falsified

(Spitzer Affid., J.A.370 para. 7; Second Rosario Affid., J.A. 379-380, para. 14). And the manner in which they were taken guaranteed inaccuracy (see: J.A. 369, , para. 5).

Consequently, the three members prepared a statement to the third trial committee in which they pointed out that previous official "minutes" taken by trial committee secretaries were either inaccurate or falsified and in which they demanded the right to tape record the hearing, at their own expense, for their own protection (Brodsky Affid., J.A. 313-314 , Exh. 4B). Though they were not allowed to read or submit the statement at t.. December 18, 1975 hearing, they submitted it by letter on December 22, 1975 (Brodsky Affid., Exh. 4A, J.A.312).

At the December 18, 1975 hearing, the three members appeared with a tape recorder. They attempted to speak and submit their statement but were not allowed to do so. Instead, the Trial Committee Chairman simply adjourned the trial hearing to January 8, 1976, over the members' protests (Spitzer Affid., J.A. 372, , para. 12).

The three members appeared, with lay counsel and their tape recorder, at the January 9, 1976 hearing. Again they were barred by the Trial Committee Chairman from either speaking or submitting a statement. When they attempted to read a statement demanding the right to use the tape recorder, the following colloquy took place (Spitzer Affid., J.A.372-373, paras. 13 and 14):

ROSARIO: We have a statement, we have a statement, brother Chairman, we have, brother Chairman.

THE CHAIRMAN: We will, we, we will not open this meeting.

ROSARIO: Brother Chairman --

THE CHAIRMAN: This Trial Committee is not opening the hearing. We will convene in another room without you.

The entire Trial Committee then stood up, walked out of the room, walked into another room (the office of two business agents), and held the trial there, behind locked doors, with the three members and their lay counsel locked outside. Dolgen and his various witnesses were called and let into the room (the door being opened from inside) or let themselves in with a key. After the trial was over, the Trial Committee members came out, returned to the original hearing room, picked up their coats and left, without saying a word to the three charged members, all of whom were standing there, waiting (Spitzer Affid., J.A. 373-374, paras. 14 to 18).

No decision was issued immediately. After three weeks of waiting, the three members wrote to the Trial Committee Chairman asking for a decision (J.A. 265). Finally, at a meeting of January 29, 1976, the Trial Committee agreed upon a decision "suspending" Rosario and Vega from attendance at "any and all" membership meetings of Local 10 for 18 months, and "suspending" Cabel from the same for 12 months (J.A. 323).

The three members promptly appealed by letter mailed and registered February 9, 1976 to the Appeal Committee (First Rosario Affid., J.A. 181-a, para. 11; and Exhibit to Second Rosario Affid., J.A. 381-3), setting forth with clarity and specificity the bases for their appeal. An appeal hearing was scheduled by the Appeal Committee for April 8, 1976, and the three members went to it, with their lay counsel and with their tape recorder, but over their protests the Appeal Committee terminated the hearing shortly after it had begun (First Rosario Affid., J.A. (missing) para. 11).

On May 6, 1976 -- a month after the aborted appeal hearing -- the Appeal Committee's secretary, Lipsig, wrote to the three members, referring to an unspecified "ruling" of the Appeal Committee and asking their compliance. Rosario wrote back, on behalf of the three, pointing out that the only "ruling" of the Appeal Committee was its termination of the hearing and that, although they protested the termination, they had complied with it. They pointed out also that the Appeal Committee had no power under the ILGWU Constitution to make "rules," but the General Executive Board did, and asked to be referred to any rule, made by it, that was relevant. On May 28, 1976, four months after the decision had been handed down by the Trial Committee, Lipsig wrote back saying that the "ruling" of the Appeal Committee to which he had referred was that "there can be only one record of the Appeal Committee hearing, and that is the official set of minutes taken by the Secretary to the Appeal Committee." (Exhibits to Lipsig Affid., J.A. 505, 506, 507).

Rosario wrote back to Lipsig, asking where the Appeal Committee derived authority to make such a "ruling," and advising that he had no objection to the Appeal Committee regarding its own record as the "official" one. He asserted the right of the three members to make their own record or notes, for their own use and protection, and emphasized their desire to exhaust all intra-union remedies in good faith. Lipsig's reply merely repeated (and quoted) what he had said before, without responding to Rosario's inquiry (Exhs. "L" and "M" to the First Lipsig Affid., J.A. 508, 509).

As noted supra (page 3, fn.), the "suspension" went into effect immediately. Rosario and Cabel found this out when they went to the February 9, 1976 meeting. Although the Sergeant-at-Arms let them in*, and nobody told them to leave, when Rosario attempted to speak at the meeting, the Chairman piously announced that they were excluded from the meeting and then read the Trial Committee's decision (Cabel Affid., J.A. 365-66,para. 14.). Accordingly, although they have continued to receive official notices when these are sent out to theLocal's mailing lists, they have remained away from "any and all Membership Meetings of Local 10" as directed by the Trial Committee's decision, until issuance of the Order below.

In July 1976, six months after the third union trial and five months after their appeal, the three members instituted this suit below, and moved for a preliminary injunction.

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* This is the meeting that Appellants, in their brief, p. 33, erroneously say that the three Appellees "broke into."

The Course of Proceedings Below

Though the suit, and the motion for preliminary injunction, were brought on July 19, 1976, consideration of the motion was delayed, first, by the two unions' request for extension of their time to answer (agreed to by counsel for the three members) and then by the two unions' statement to the Court below that (a) they desired argument; and (b) they (counsel) would be on vacation until Labor Day. In response the Court set a hearing for September 8, 1976.

At the September 8, 1976 hearing (the first of three in the Court below), counsel for the three members opened by stating plaintiffs' readiness for an evidentiary hearing if that was desired by the Court (and advising of the presence of plaintiff Rosario, as prospective witness)(Transcript, J.A. 39), and then followed with a brief statement of the facts as set forth in the affidavits before the Court (J.A. 39-44). Since it was apparent that the Court was familiar with the affidavits, a short summary sufficed. In response, counsel for Local 10, after setting forth his position, told the Court (J.A. 59):

> "I say that there is no issue of fact in this case. It is a matter of law."

No request was made by either of the two unions for an evidentiary hearing.* However, the Court determined

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* The two unions' opposition to the holding of an evidentiary hearing was stated by Local 10's counsel, Emil Schlesinger, Esq., in a letter addressed to the three members' counsel but submitted by Mr. Schlesinger to the Court at the second hearing below, held on September 14, 1976. In the letter, Mr. Schlesinger noted that (cont'd)

that testimony from the Chairman of the Appeal Committee, a certain Mr. Kramer, would be helpful on a disputed question which the Court put as "whether the committee would allow a public stenographer to be brought by the plaintiff...."* (Transcript, Sept. 8, 1976, J.A. 90). The Court thereupon gave the following instruction to Mr. Zimny, ILGWU's counsel (J.A. 90-91):

> THE COURT: Now we are going to continue the hearing until next Tuesday, and you bring down the chairman of this committee to testify here. I want to know what the facts are in this case, whether he would be denied a public stenographer.
>
> MR. ZIMNY: The secretary rather than the chairman? I don't know if the chairman will be available.
>
> THE COURT: Well, we have got to have somebody who can speak for the committee.
>
> MR. ZIMNY: Yes.

(cont'd)
the members' counsel had said, in letter, that Rosario had been present in Court in expectation of an evidentiary hearing. Mr. Schlesinger commented, in his letter (submitted to the Court):

> "The statement in your letter that the argument on your motion for a preliminary injunction and Local 10's motion for summary judgment was expected to be an evidentiary hearing is as untrue as your other statements. You knew it was intended to be an argument and not an evidentiary hearing. Indeed, if, as you say, it was intended to be an evidentiary hearing why did you not also bring with you Vega, Cabel and Spitzer. Cabel, Spitzer and Rosario made principle /sic/ affidavits for the plaintiffs in the pending case."

The abusive style of Mr. Schlesinger's letter, and its accusation of untruthfulness, have been characteristic of the unions' litigatory technique throughout. In this instance, it emphasizes the fact that the two unions, at least, did not expect nor did they request an evidentiary hearing.

* Such testimony was called for because of ILGWU's unwillingness to say whether the three members would have been permitted to bring a public stenographer with them if they had specifically requested permission to do so: Transcript, Sept. 8, 1976, J.A. 88-89. He appears later to have admitted that they would not have been so permitted: Transcript, Sept. 17, 1976, J.A. 7-8. At any rate, the papers submitted by Local 10 and by ILGWU make it clear that they would not have been permitted to bring a stenographer with them; see page 19 , infra, footnote.

However, the ILGWU did not produce either the Chairman (Mr. Kramer) or the Secretary (Mr. Lipsig). Instead, it produced a certain Mr. Gross who, as the unions concede in their brief, was of "no help" (Appellants' brief, page 12). The ILGWU did not explain its failure to produce a witness capable of testifying concerning the question posed by the Court -- or capable of testifying as to any of the relevant facts. Accordingly, the Court directed the parties to be ready for a full evidentiary hearing at the next (or third) hearing, which was scheduled for September 17, 1976. Neither of the two unions, however, requested an evidentiary hearing; instead, in suggesting that none was necessary, counsel for ILGWU argued as follows (Transcript, Sept. 14, 1976, J.A. 49):

> MR. ZIMNY: May I point out that you have many, many documents before you in the papers, already official documents, which dispose of many, many facts.

At the third hearing below, held September 17, 1976, the Court sought to save judicial time by establishing what facts were not in dispute. One of these was found to be the fact that the Local 10 Trial Committee refused to let the three members come into the January 8, 1976 union trial hearing because they insisted on bringing a tape recorder (Transcript, Sept. 17, 1976, J.A.144). Another was that they did not specifically ask to bring a public stenographer and a third was that, if they had asked, they would not have been allowed anyway (Transcript, Sept. 17, 1976, J.A. 145-148).

There was further discussion in which ILGWU's counsel made an offer of settlement (rejected) and Local 10's counsel

made a lengthy statement. Local 10's counsel concluded by lamenting plaintiffs' intransigence ("... because there is nothing that will satisfy Mr. Hall /plaintiffs' counsel/") and adding that "... if he /Mr. Hall/ wants an evidentiary hearing I have brought witnesses here. Let's have an evidentiary hearing." (Transcript, Sept. 17, 1976, J.A. 156).

Neither of the two unions, however, or their counsel stated that they desired an evidentiary hearing. The Court inquired, in response to the last-quoted statement of Local 10's counsel, "what we are going to hear"; Local 10's counsel responded with what might be construed as an offer of proof (Transcript, Sept. 17, 1976, J.A. 156-157), but which, if it was intended to be such, did not indicate that evidence would be offered on any material issue.*

After hearing Local 10's counsel out, and after further inquiries to determine whether there were disputed material facts, the Court announced that it was ready to rule (Trans-

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* The two unions quote this passage in their brief, at pp. 14-15, as though it were an offer of proof, without specifically asserting that it was. At any rate, it appears to claim nothing more than that defendants are admirable folk while plaintiffs are "bad guys." Thus the gist of it goes:

> "You are going to hear from me that they're cheaters and liars.... You are going to hear from me that Mr. Spitzer will give you a tape recording which is absolutely doctored, and tailored in the garment industry language to fit his needs. We are going to show that the minutes of meetings are honest and fair, that these cutters whom I brought from the shops are decent, honest men who have done their job. They are not controlled. They are not manipulated.... We are going to prove that these are honest people and that these people, Mr. Tomas Rosario, and Mr. Spitzer want to destroy this union and we aren't going to let them do it."

cript, Sept. 17, 1976, J.A. 164). Counsel for Local 10 asked, and was permitted, to hand up two papers (J.A. 164) and then read to the Court from the decision in Kiepura v. Local Union 1091, 358 F.Supp. 987 (N.D. Ill. 1973), underscoring a passage that he deemed helpful to defendants (J.A. 165-166). Neither he nor anyone else asked the Court to hold an evidentiary hearing before making its ruling. And neither he nor anyone else protested against the Court's announcement of its intention to make its ruling. Accordingly, the Court proceeded to make its ruling (J.A. 16 -171). A memorandum, supplementing ts oral opinion, was handed down the following Monday, September 20, 1976 (J.A. 3-7).

SUMMARY OF ARGUMENT

The three union members were barred and excluded from their union trial because they demanded and insisted upon their right to make a record of proceedings. Since, as a basic element of a fair trial, they were entitled to insist on the right to make a record, there was no reasonable justification for excluding them from the trial. Nor was there any justification for excluding their lay counsel, who did not have any tape recorders in their possession.

As a result of their exclusion, and the exclusion of their lay counsel, the three members were denied the rights of confronting their accusers, cross-examining witnesses who testified against them, and presenting their own defense. Quite obvicusly, they were denied a full and fair hearing and

the disciplinary suspension imposed upon them violated Section 101(a)(5) of the LMRDA, 29 USC 411(a)(5).

Additionally, the suspension -- which is not a suspension from membership but only from attending meetings -- is void on its face, since it purports to deprive three members of rights guaranteed them by Sections 101(a)(1) and (2) of the LMRDA, 29 USC 411(a)(1) and (2). And the union's refusal to give them, for use in their defense, copies of the official minutes of their previous union trials was an additional violation of Section 101(a)(5).

These facts -- and the more detailed facts on which they rely -- are fully established in the affidavits that were before the Court below and are reprinted in the Joint Appendix. Though, as the Court noted (J.A. 5), some facts are in dispute, there is no dispute as to the facts material to the issuance of the preliminary injunction. Any apparent disputes as to those facts were resolved by the Court at the oral hearings below. There was thus no need for an evidentiary hearing, and in fact no evidentiary hearing was demanded by either of the two unions.

On the clear and undisputed facts, the Court properly found that plaintiffs had established probable success on the merits. And it is plain that, but for the order below, the members would be barred from attending one or more membership meetings, and thus suffer injury irreparable in damages.

POINT I.

THE UNIONS' CONTENTIONS ARE WITHOUT MERIT.

The appellant unions appear to base their main contentions upon a misunderstanding of the purpose of an evidentiary hearing on a preliminary injunction motion under Rule 65, FRCP. Thus it turns out that they base their extraordinary assertion to the effect that (they claim) the Court below never read the affidavits submitted to it solely upon the fact that it contemplated hearing oral testimony.* Then the unions reason, having contemplated an evidentiary hearing the Court was bound to hold one, even though it was not requested by either party and even though the affidavits, plus the facts orally stipulated to as undisputed, were sufficient to base its ruling upon.

Such absurd contentions do not require detailed refutation. But scattered about Appellants' brief, mixed almost randomly under the two point headings, are a variety of contentions, attacking the alleged failure of the Court

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* This is such extraordinary logic that it may be helpful to quote the Appellants' reasoning. At page 28 of their brief, Appellants contend:

> "In fact, defendants respectfully submit that it /the Court below/ never read these affidavits -- nor any of the memoranda of law submitted by defendants -- which is precisely why she perceived the need for testimony."

No support for this "respectful" suggestion, other than the specious logic quoted here, is offered by Appellants. The logic, of course, fits Appellants' own malapropism: "a perfect non-sequestor." And it may be dismissed on the basis of Appellants' favorite aphorism: Merely stating that it is so is not proof that it is so.

In reality, as the transcript of the three hearings indicates, the Court below thoroughly studied the affidavits and memoranda submitted and was entirely familiar with them.

below to hold an evidentiary hearing, its alleged failure to make proper findings of fact, its failure to punish plaintiffs for their refusal of the unions' late offer of settlement, etc. And something should be said on these matters.

1. The Non-Holding of an Evidentiary Hearing.

It is not apparent that either of the two unions, the Appellants here, ever requested an evidentiary hearing. Certainly they made no request for one before the actual hearings were held below. And neither of them made anything than can be construed as such a request at either the first or the second hearing below. The only hint of a request, on the part of either of the two unions, appears in the words of Local 10's counsel, spoken at the third hearing: "Let's have an evidentiary hearing" (Transcript, Sept.17, 1976, J.A. 156, 159 -- and the context in which the quoted words were spoken indicates that they were not to be understood (and were not likely to be understood) as a request that such a hearing be held. Up to that point, the two unions had opposed the holding of an evidentiary hearing; and the context in which the words were spoken indicates that they continued to oppose one but that they believed plaintiffs' counsel was demanding one (see discussion supra, pages 10-13). And thereafter, neither of the two unions made any request for an evidentiary hearing, nor did either of them protest when the Court announced its readiness to rule without an evidentiary hearing (see discussion, supra, pages 13-14). Moreover, an examination of Appellants' Brief, pages 10 to 16, indicates that even now they do not claim to have requested an evidentiary

hearing. Instead, their argument appears to be that the Court, having contemplated the possible need to hold one, thereby became bound to do so.

Far from demanding an evidentiary hearing, the defendants "joined the battle of affidavits with as much relish as the plaintiffs." Cf. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2 Cir. 1970). Indeed, the affidavits they submitted are far more numerous and voluminous than those submitted by Appellees. The two unions, Appellants, gambled upon the persuasiveness of those affidavits; and as this Court said in Semmes, supra, at loc. cit., "A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse." If they were unwilling to rest on their affidavits, it was their responsibility to say so clearly at the commencement, or before the commencement, of the hearings below. As this Court commented in S.E.C. v. Frank, 388 F.2d 486, 493, fn. 6 (2 Cir. 1968),

> "... if a party is unwilling to have the issuance of a temporary injunction decided on affidavits, he must make his objection known; he may not gamble on the judge's accepting his affidavit rather than his adversary's and then seek reversal if the result is disappointing."

Moreover, there was plainly no need for an evidentiary hearing. Local 10's counsel was correct when he stated to the Court, at the first of the three hearings below (Transcript, Sept. 8, 1976, J.A. 59),

> "I say that there is no issue of fact in this case. It is a matter of law."

And there was none -- until ILGWU's counsel refused

to say whether, had the three members brought with them to the Appeal Committee hearing a public stenographer instead of a tape recorder, they would have been allowed to make a stenographic record of the proceedings (cf. Transcript, Sept. 8, 1976, J.A. 88-89). The inability of the witness he produced at the second hearing to answer that question necessitated a third hearing -- all despite the fact that there was in reality no genuine dispute on this point.*

The obvious purpose of the hearing requirement in Rule 65, Fed.R.Civ.P. is to prevent grants of injunctions on ex parte applications and to ensure that relief follows only after consideration of all facts and arguments deemed important by the parties. Drywall Tapers and Pointers v. Operative Plasterers and Cement Masons, 537 F.2d 669, 674 (1976). Plainly, the Court below gave full consideration to all such facts and arguments. And it was clear, ultimately, that there were no material facts in dispute. Accordingly, there was no need for an evidentiary hearing. Cf. Ibid, and S.E.C. v. Koenig, 469 F.2d 198, 202 (2 Cir. 1972); Herbert Rosenthal Jewelry Corp. v. Grossbardt, 428 F.2d 551, 554-555 (2 Cir. 1970); National Association of Letter Carriers v. Sombrotto, 449 F.2d

* Nat Klein, Local 10's Secretary, had admitted in the first affidavit submitted by Local 10 (J.A. 206) that the policy of exclusion applied as much to public stenographers as to tape recorders -- and that this extended to Appeal Committee hearings as well as to local trial hearings. When this was read at the hearing below, ILGWU's counsel refused to acknowledge it, saying that it came "from an affidavit by an officer of the local union" (Transcript, Sept. 8, 1976, J.A. 53). However, the same was subsequently admitted in a late-submitted affidavit of ILGWU's President, Sol C. Chaikin, J.A. 529-530.

915, 921 (2 Cir. 1971); and compare: S.E.C. v. Frank, supra, 388 F.2d 486, 490-491 (2 Cir. 1968).

It is clear and undisputed in the papers that the three members had demanded, in advance of their trial by Local 10, copies of the official minutes of their previous trials and that this obviously-relevant and useful material was denied them despite their repeated demands; see J.A. 223 to 237; see also J.A. 60 (Schlesinger admission at first hearing below). It is also clear that the three members appeared for their trial hearing but were excluded from it on the sole ground that they had with them a tape recorder -- and it is clear and undisputed that their lay counsel, who did not have any tape recorder with them, were also excluded (Spitzer Affid., para. 15, J.A. 15). It is clear and undisputed, further, that the trial was held without the presence of either the three members or their lay counsel and that the members were, as discipline, "suspended from the right to and /were/ barred from attending and participating in any and all Membership Meetings of Local 10" for periods, in the case of Rosario and Vega, of 18 months and in the case of Cabel of 12 months. See: J.A. 323. It is clear that the three members promptly appealed to the Appeal Committee (First Rosario Affid., para. 11, J.A. 181-a), and that their appeal clearly and concisely set forth their grounds for appeal (J.A. 381-383). It is clear that they appeared at the Appeal Committee's hearing and that the Appeal Committee terminated the hearing, over their objections, on the ground that they had brought with them a tape

recorder (First Rosario Affid., para. 11, J.A. 181-a). It is clear that in subsequent letters to the Appeal Committee's Secretary, Mr. James Lipsig, the three members stated their readiness to appear at any further appeal hearing and in all respects to exercise their intra-union remedies in good faith (J.A. 506, 508). It is clear that they pursued these remedies for more than four months after the disciplinary punishment was imposed. It is likewise clear that, but for the Order of the Court below, the three members would have been barred from attending the membership meeting of September 20, 1976 (J.A. 159 (Schlesinger admission)) and would be barred from attending the membership meeting scheduled for November 15, 1976.

On the issue of the reasonableness of the three members' demand for their right to make a record of the trial and appeal proceedings within the labor organizations, it is clear that (a) no verbatim or accurate record was kept by either of the unions; (b) even as to the "official minutes" that were made, inaccurate as they were, the three members could not count on obtaining copies; and (c) had they brought or attempted to bring with them a public stenographer instead of a tape recorder, either to the Local 10 trial proceeding or the Appeal Committee hearing, they would still have been barred from making a record.

Plainly, these facts were sufficient to justify a

preliminary injunction.

2 The Findings of Fact.

Appellants' challenge to the Findings appears to combine two claims: one is that the Court failed to grant summary judgment one way or another and, in so doing, dispose of all the issues in the case; the other is that as to some issue or other relevant to issuance of the preliminary injunction no explicit finding is contained in the Court's decision.

The listing by Appellants at pages 17 to 18 of their brief of five items which, they say, the Court failed to make findings, appears to relate to the first of these two claims. Since the matters listed there are immaterial to the issue of a preliminary injunction*, it would appear that what Appellants really mean is that since some or all of these allegations were made by the three members, in their Complaint or elsewhere, the Court was obligated to rule upon them. That argument may be easily disposed of by citing Brown v. Chote, 411 U.S. 452, 456, 36 L.Ed.2d 420, 424, 93 S.Ct. 1732, 1735 (1973) and Herbert Rosenthal Jewelry Corp. v. Grossbardt, supra, 428 F.2d at 554. The issues raised on a motion for preliminary injunction are distinct from those raised when permanent injunctive relief is sought. Cf. American Visuals Corp. v. Holland, 261 F.2d 652, 654 (2 Cir. 1958); Chappell & Co. v. Frankel, 367 F.2d 197, 203-204 (2 Cir. 1966).

* An exception might be noted as to the matter listed as (b) -- whether plaintiffs requested a stenographer. But plaintiffs did not claim that they had; in fact, they admitted they had not because they knew and and had been told that they could not bring one; Transcript, Sept. 17, 1976, [illegible].A. 145.

Appellants' second claim -- that there were factual issues material to the motion for preliminary injunction, or to the issuance of a preliminary injunction, as to which findings were not made -- fails for want of a showing by Appellants that any fact material to such issue was genuinely disputed. Plainly, there need be no findings as to facts not in dispute* and here whatever disputes as to the facts appeared from the papers were either resolved in the oral hearings or determined to be immaterial to issuance of the preliminary injunction.

Appellants seek to find a disputed fact, requiring a finding, in the question of exhaustion of intra-union remedies prior to institution of suit. They devote ten pages to that effort (pages 18 to 28, Appellants' Brief). They do not deny that the facts as to exhaustion are clear and undisputed: i.e.,

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* The Advisory Committee's Note to the 1948 amendment to Rule 52(a), Fed.R.Civ.P., states "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters"; 5 F.R.D. at 471. On this point, Judge Yankwich has written, "It has ever been the law of pleading that where the facts are undisputed or are agreed or stipulated to, no findings are necessary." Yankwich, Findings in the Light of the Recent Amendments, 1948, 8 F.R.D. 271, 281. And see: Wright & Miller, Federal Practice and Procedure: Civil, Section 2579, at pages 711-712 of Vol. 9 (1971); Moore, Federal Practice, Vol. 5A, Section 52.07, page 2733.

Where there are no disputed facts, there need be no findings at all. As this Court, per Judge A.N. Hand, said in Douds v. Local 1250, Retail Wholesale Dept. Store Union, 170 F.2d 695 (2 Cir. 1948),

> "The absence of findings was not only a non-jurisdictional defect (see opinion of Clark, J., in Rossiter v. Vogel, 2 Cir., 148 F.2d 292), but findings were not requisite where no issue of fact existed. Fontes v. Porter, 9 Cir., 156 F.2d 956."

the facts that the three members duly appealed, that they attended the appeal hearing, that they thereafter persisted in their efforts to appeal and that they consistently stated their readiness to appear at an appeal hearing. Nor do they deny that the findings are adequate on such facts; indeed, the Court explicitly found (Memorandum, J.A. 6):

> "It is also clear that, on April 8, 1976, the GEB Appeal Committee met to consider plaintiffs' appeals, but refused to do so until such time as plaintiffs agreed to come to the hearing without a tape recorder. Because of plaintiffs' refusal to come to the appeal under such conditions, the appeal of this trial has never been determined."

But under guise of challenging the findings, the Appellants argue that the three members did not "really" pursue their remedies because of their insistence on making a record of the appeal hearing. Obviously that is a legal argument, not a factual one, and does not require a finding. On the other hand, if treated as a serious legal argument (demanding denial of relief because of inadequate exhaustion) Appellants' argument appears to run afoul of ILGWU's own Constitution, which is Exhibit "A" to the first Lipsig Affidavit, J.A. 489. Nothing in ILGWU's Constitution bars or purports to bar or could reasonably be interpreted to bar any member from making a tape or other record of any trial or appeal proceeding. All it has to say on the question of minutes applies to the official minutes taken by the trial or appeal committee secretary: it says that he shall file them in the office of the union of which the committee is a part (Article 22, Section 2; page 53). Furthermore, although the ILGWU

Constitution gives the General Executive Board authority to "make rules for the government of the I.L.G.W.U. and its subordinate organizations which are not inconsistent with this constitution...." (Article 3, Section 8(d), page 9), it does not give any such authority to the Appeal Committee or to any other body. And the General Executive Board does not appear ever to have adopted any such rule. At least, the three members have never been advised of any such rule, despite their repeated inquiries.* Surely it would be strange for a union to be heard to argue that its members should be barred

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* As early in the appeal process as they reasonably could, he three members inquired whether the General Executive Board had ever adopted any rule or regulation purporting to bar members from making a tape or other record of trial or appeal proceedings (J.A. 506, 508). Their inquiries received no reply (J.A. 507, 509). And the response to their letters plainly indicates that the answer was "No"; i.e., the Board had made no such rule or regulation.

Rather late in this proceeding -- in an affidavit sworn to September 14, 1976 and submitted to the Court below at the second hearing (which was held on that date) -- ILGWU's President, Sol C. Chaikin, attempted to dispose of this embarrassment by making a number of last-minute "interpretations" of the ILGWU's Constitution. Not surprisingly, his "interpretations" were geared toward supporting ILGWU's position. According to his "interpretations," the provision of the ILGWU Constitution that requires official minutes to be filed in the office of the union of which the trial or appeal board is a part is held to mean that nobody other than the taker of "official" minutes is allowed to take any minutes at all (J.A. 529-530).

In addition, Mr. Chaikin "interprets" the October 1975 letter of the General Executive Board, which reversed the decision of the Appeal Committee and directed a new (third) trial of the three members, to be an adoption of this view. The letter directs the Local 10 Trial Committee to select a Secretary "who shall prepare the official minutes of the hearing." It does not say -- but Chaikin says -- that this forbids any other minutes. With even bolder illogic, he declares that, although the Board reversed the Appeal Committee's decision, it "really" adopted the Appeal Committee's ruling forbidding tape or stenographic records of proceedings (J.A. 528-529).

from coming to court to challenge unlawful discipline because of imperfect compliance with a "rule" that was never adopted and of whose supposed existence it failed to advise them.*

Appellants couch their non-exhaustion argument as a challenge to the findings of the Court below in the apparent hope that, so couched, it will not be closely scrutinized. But it was not a factual assertion and did not require a finding. It is simply a (false) argument of substantive law which the Court below rightly rejected.

3. The unions' other arguments.

These may be disposed of quickly. As noted earlier, the Appellants' outrageous and unsupported assertion to the effect that the Court failed to study the affidavits and memoranda before it can be abruptly dismissed on the basis of Appellants' own aphorism, "Merely stating that it is so is not proof that it is so." And their assertion that the three members' rejection of the unions' late and unrequested "settlement offer" (in reality a demand that the members drop their suit and submit to still another union trial -- a fourth one! -- on the same charges) was "so obstructive and antagonistic" that the Court's "failure" to take punitive action constituted error (Appellants' Brief, page 23), may be brushed aside

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* The same, of course, applies to a retroactive "interpretation" of the Constitution. Members may be held to compliance with what the Constitution plainly says; they cannot reasonably be held to comply, in order to exhaust their internal remedies, with what some official subsequently "interprets" it to mean.

As to the discretion of the District Court in requiring or not requiring exhaustion of remedies, cf. N.L.R.B. v. Industrial Union, etc., Local 22, 391 U.S. 418, 426, 20 L.Ed.2d 706, 713, 88 S.Ct. 1717 (1968).

with the observation that nobody is required to submit to its demands merely because it chooses to make them.

Similarly, Appellants' "laches" argument -- to the effect that the members should have brought suit attacking their third union trial before the union trial was held (Appellants' Brief, pp. 44-46) -- may be dismissed with the observation that there could be no ripe case or controversy regarding the third union trial until the third union trial had been held.

Finally, we have (Appellants' Brief, page 44) the assertion that the preliminary injunction grants plaintiffs all the relief demanded in their Complaint.* That assertion is contradicted by the Complaint itself (J.A. 8, 13), which demands (a) permanent injunctive relief barring enforcement of the suspension; (b) injunctive and declaratory relief directing that the suspension be vacated and declaring it null and void; (c) compensatory damages; (d) punitive damages and (e) costs, including a reasonable attorneys' fee pursuant to Hall v. Cole, 412 U.S. 1 (1973).*

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* Appellants seek to buttress their argument a bit with some plain sleight of hand. Earlier (page 27) they had quoted the undersigned's remark, apropos of the suggestion that plaintiffs submit to a fourth union trial, stating that plaintiffs want no new union trial. As their arugment on that page makes clear, they understood the remark to refer to a union trial. Yet seventeen pages later (Appellants' Brief, page 44), apparently in the hope that the brief-reader will have remembered the words but forgotten their context, Appellants declare blandly that "plaintiffs have admitted that they do not want a trial" -- suggesting that the undersigned was referring to trial of this action. Appellants' statement is not a merely innocent mistake; it is and was a deliberate attempt to deceive and mislead the Court. The undersigned respectfully submits that it should be dealt with accordingly.

POINT II.

THE THREE MEMBERS, BY BEING EXCLUDED FROM THEIR OWN TRIAL (AND BY THE EXCLUSION OF THEIR LAY COUNSEL AS WELL) WERE DENIED A FULL AND FAIR HEARING.

When the three members appeared for their trial before Local 10's Trial Committee on January 8, 1976, the Chairman of the Committee refused to open the trial and refused to allow them to speak. Instead, he stood up, announced that the Trial Committee would hold its trial without them, and led the entire Trial Committee to another room where, behind closed doors, it conducted a trial of the three members, without allowing either them or their lay counsel to be present.

The three members had brought with them a tape recorder to make a record of the hearing. This was the ground used by the Trial Committee Chairman for excluding them from the trial. No explanation has ever been given for the exclusion of the three members' lay counsel, who did not have any tape recorder. And the three members were not invited to attend the trial (or have their lay counsel attend the trial) without the tape recorder.

Obviously, by their exclusion -- and the exclusion of their lay counsel -- the members were denied the fundamental rights of a fair hearing: confrontation, cross-examination, the right to present a defense. And since Section 101(a)(5)(C)

of the LMRDA, 29 USC 411(a)(5)(C provides that no member of a labor organization may be disciplined unless he has been "afforded a full and fair hearing," it would appear on the face of things that the discipline imposed upon the three members is violative of that section.

Additionally, it is clear that the defendant labor organizations intended to, and did, forbid the three members to make or have made a tape or stenographic record of their trial and appeal hearings. Indeed, the distinction between the two types of records may be overlooked, since the two unions treat them the same: both are forbidden. Lipsig, the secretary of the Appeal Committee, explained the theory of such refusal as follows (J.A. 507):

> "The ruling of the Appeal Committee ... is that there can be only one record of the Appeal Committee hearing, and that is the official set of minutes taken by the Secretary to the Appeal Committee. Accordingly, tape recording the hearing ... will not be permitted."

He could have added also,"Accordingly, a stenographic record will not be permitted." Or more simply, "Accordingly, you are not permitted to make any record, by any method whatever." And the same rule is offered for barring any stenographer and any tape recorder from a trial committee hearing: see Chaikin affidavit, J.A. 529-530.

There is considerable authority for the proposition that the right to make, or have made, a stenographic or tape record of a union trial proceeding is an essential element of the "full and fair hearing" guaranteed to members by Section

101(a)(5)(C) of the LMRDA. Cf. Deacon v. Operating Engineers, Local 12, 59 LRRM 2706, 2709, 52 CCH Lab. Cas. Para. 16,605, at 23,399-400 (SD Cal. 1965); Jacques v. Longshoremen's Local 1418, 246 F.Supp. 857, 860 (ED La. 1965), in both of which the court directed the union, in conducting a trial of the member, have a transcript of the proceedings made.* As two commentators have noted, "It appears ... that the federal courts under the LMRDA will require transcripts to be made by a qualified stenographic reporter...." Etelson and Smith, Union Discipline under the Landrum-Griffin Act, 82 Harvard Law Rev. 727, 750 (1969).

The reasoning behind such requirement was well stated by Etelson and Smith, in Ibid, at pages 750-751, as follows:

> "Such a rule serves a number of useful purposes. It ensures that a complete record will be made for use during internal appeals and by courts reviewing the union action. The record enables the reviewing bodies to reconstruct and appraise the evidence considered at the trial and to determine whether safeguards were afforded the member. It also provides a useful means of detecting bias among the members of the trial board through, for example, their statements to witnesses and parties, or their manner of conducting the proceeding. At the very least, it provides the court with a basis for directing or permitting further inquiry into areas where it has doubts as to the adequacy of the trial. It is, therefore, one of the more essential procedural protections recognized under the Act."

Failure to supply the member with a copy of the transcript of his hearing, upon his request therefor, to permit his

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* See also Falcone v. Dantinne, 288 F.Supp. 719, 727 (ED Pa. 1968), reversed on other grounds, 420 F.2d 1157 (3 Cir. 1969), in which the court indicated that the plaintiff was entitled to a transcript as of right but had waived that right by voluntarily assuming responsibility for obtaining a reporter and then failing to do so.

use of it in his intra-union appeals, likewise has been held to violate the guarantees of Section 101(a)(5)(C); cf. Kuebler v. Cleveland Lithographers, 473 F.2d 359, 361, 364 (6 Cir. 1973).

Whether the union's failure to have a stenographic record made does or does not constitute a denial of a full and fair hearing, a union which, failing to have such a record made itself, refuses to allow the charged member, at his own expense, to have such a record made, plainly does violate the guarantee of Section 101(a)(5)(C). Thus in Kiepura v. Local Union 1091, United Steelworkers, 358 F.Supp. 987, 991-92 (ND Ill. ED 1973), the Court ruled as follows:

> "Plaintiff offered to supply a court reporter at the hearing at his own expense. We believe this was a reasonable request. The union constitution provides for a 4-step appeal procedure up to the International Convention, and the plaintiff should have been given an opportunity to make his record for this purpose. In view of the remedy now provided by the Labor-Management Reporting and Disclosure Act, a stenographic record of the hearings would have greatly facilitated the court, since much of the evidence in this case was an attempt to reconstruct what took place at a hearing four years ago. We do not hold that the use of a court reporter is a necessary element of a 'full and fair hearing', but we do hold under the circumstances of this case that the refusal to allow the plaintiff to supply a court reporter at his own expense was an abuse of discretion which did tend to deprive him of such a hearing."

Compare what this Court said, in Sheldon v. O'Callaghan, 497 F.2d 1276, 1283, fn. 9 (2 Cir. 1974) concerning a similar "stiff-necked refusal" of a member's reasonable request for a mailing at his own expense.

In this case, the members were not only refused the right

to make a record at their own expense. In addition, they were excluded from the trial hearing because of their demand that they be permitted to make such a record at their own expense.

In the latter respect, this case is on all fours with Hart v. Local Union 1292, 341 F.Supp. 1266, 1269 (ED NY, Bartels, D.J., 1972), affirmed, 497 F.2d 401 (2 Cir. 1974). There, the union member appeared at his (first) union trial hearing with a tape recorder and insisted upon using it. As the union Trial Committee's Report* records,

> "At the appearance before the Executive Committee, Bro. Hart entered the room with a tape recorder in his possession. On being questioned as to whether it was operating, Bro. Hart claimed it was....
>
> "On being called into the room for trial, Bro. Hart again with the tape recorder in his possession, requested the chairman and committee to scrutinize a document. ... When informed by the Chairman that provisions were made to record the trial within the prescribed laws of our Brotherhood, Bro. Hart challen/g/ed the competency of the Secretary and refused to remove his recorder from the room. Bro. Hart subsequently refused to stand trial without his recorder and left the room. The trial proceeded and here we have the penalty."

The defendant union in the Hart case argued that it was justified in excluding Hart from his (first) union trial because of

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* The full Report is reprinted on page 22a of the Joint Appendix on appeal in Hart v. Local Union 1292, supra, Dkt. No. 73-2063 (2nd Cir.). A full transcript of the hearing, taken by the union (via a tape recorder) was also before the Court, but not reprinted in the Joint Appendix.

The undersigned, who was counsel for plaintiff in Hart v. Local Union 1292, supra, supplied counsel for Local 10, in this case, with copies of the two documents referred to above -- the Report of the Trial Committee and the transcript of the hearing in the Hart case -- in advance of the hearings in the Court below in this case, and in advance of his time to file papers in opposition to the motion for temporary injunction. As a result, the Court below heard defendants' views on the Hart case as well as plaintiffs'.

his insistence upon using the tape recorder. The Court rejected the union's argument. After noting that the union had failed to have the proceedings recorded by a competent stenographer, the Court observed (341 F.Supp. at 1269),

> "But this is not the only reason the hearing was unfair. The union trial was also defective because of the exclusion of Hart from the trial. Consequently, it is clear that Hart was denied a 'full and fair hearing' at his first trial as required by statute."

It would appear to be established law, therefore, that exclusion of a union member from his union trial because of his insistence upon making, at his own expense, a tape record of the proceedings, denies him the full and fair hearing guaranteed by Section 101(a)(5)(C), and that a s a result any disciplinary punishment imposed upon him as a result of the union trial proceeding is null and void. It follows that the Court below was correct in concluding that the plaintiffs here had established probable success on the merits and, most certainly, that it was correct in finding that they had presented a sufficiently serious question going to the merits to present a ground for litigation.

POINT III.

EVEN ASIDE FROM THE EXCLUSION OF APPELLEES (AND THEIR LAY COUNSEL) FROM THEIR UNION TRIAL HEARING, AND THE DENIAL OF THEIR REQUEST TO MAKE A RECORD, THERE ARE ADEQUATE GROUNDS TO SUPPORT A PRELIMINARY INJUNCTION.

As the Court below noted (page 5 of Memorandum, J.A. Exh. 3), plaintiffs offered other grounds for preliminary injunc-

tive relief. At least two of these rest on clearly established and uncontroverted facts.

First, as noted earlier, it is undisputed that the three members, in advance of their third union trial, demandent copies of the official minutes of their previous trials onthe same charges -- and that Local 10 refused to give them, or even to allow them to see, those official minutes (J.A. 223-237; and see also Transcript, Sept. 8, 1976, J.A. 60).

Unquestionably, that material would have been useful to the three members in preparing their defense and in cross-examining the witnesses who testified against them. Refusal of their demand therefore infringed their right to a full and fair hearing; cf. Kuebler v. Cleveland Lithographers, supra, 473 F.2d at 361, 364.

Second, the discipline imposed upon the three members, while not suspending them from membership (quite the contrary: it provided that "in all other respects, Brothers Rosario, Vega and Cabel shall have full rights of membership...."; J.A. 323), nevertheless does bar or purport to bar them from attending and participating in membership meetings (J.A. 323). Obviously, they remain "members" of the labor organization within the meaning of Section 3(o) of the LMRDA, 29 USC 402(o). As such, they remain entitled to attend and participate in membership meetings equally with other members, and entitled to

express at meetings their views upon any business properly before the meetings, pursuant to Section 101(a)(1) and (2) of the LMRDA, 29 USC 411(a)(1) and (2); cf. Hughes v. Local No. 11, 387 F.2d 810 (3 Cir. 1961), cert. den. 368 U.S. 829; Ferger v. Local 483, 238 F.Supp. 1016 (ED Pa. 1964), aff'd 343 F.2d 430 (3 Cir. 1964). In short, the disciplinary suspension is void on its face and should be enjoined. Specifically in point is Stachan v. Weber, 535 F.2d 1202, 1203 (9 Cir. 1976), in which the union members, because of their refusal to participate in the flag salute and pledge of allegiance, where barred from attending the initial portion of the membership meetings, at which the salute and pledge were performed. In upholding a preliminary injunction, enjoining the union from so excluding the members, the Ninth Circuit ruled, at loc. cit.

> "The District Court correctly held that the union cannot exclude appellees from the meeting. The exclusion would clearly violate the equal rights section of the Act, 29 U.S.C. § 411(a)(1)."

CONCLUSION

For all the foregoing reasons, and those set forth in the Opinions below, the decision of the Court below should be affirmed.

Respectfully submitted,

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United States Court~~s of~~ Appeals
for the Second Circuit

Thomas Rosario, Olivido Vega and Ray Cab[illegible]

Plaintiffs-Appellees,

against

Amalgamated Ladies'Garment Cutters'Union, Local 10 of I.L.G.U. and International Ladies' Garment Workers' Union, AFL-CIO,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jesse J. Johnson, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 1465 Jesup Avenue, Bronx, New York
That on October 29, 1976, he served 2 copies of Brief on:
on

Emil Schlesinger and Max Zimny,
Attorneys for Defendant-Appellant,
1710 Broadway,
New York, New York, 10019

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jesse J. Johnson

Sworn to before me this
29th day of October, 19 76.

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977